In the High Court of Judicature at Madras

Dated :- 29.11.2007

Coram :

The Honourable Mr.Justice K.RAVIRAJA PANDIAN
and
The Honourable Mrs.Justice CHITRA VENKATARAMAN

W.P.No.44482 of 2002

M/s.Jain Distributors
18 Kondithope
Chennai 600 079. ... Petitioner

Vs.

1. The Registrar,
Tamil Nadu Taxation Special Tribunal
Chennai.

2. The Commercial Tax Officer,
Vallalarnagar, Assessment Circle,
Chennai .

3. The State of Tamil Nadu rep. By
its Secretary, Department of Commercial
Taxes and Religious Endowments
Fort St. George
Chennai. ... Respondents

PRAYER: Writ petition under Article 226 of the Constitution of India praying for the relief of issuance of writ of Certiorarified mandamus to call for the records of the first respondent in T.P.No.161 of 2001 quash the same and declare Entry 7 of Part of the First Schedule of the TNGST Act, 1959 to the effect that "all tooth pastes whether or not medicated or as defined under the Drugs and Costmetics Act, 1940, is liable to the rate of 12%" is illegal and consequently the exclusion of the products capable of being used as tooth pastes which is otherwise a medical formulation or preparation ready for use externally for treatment of mitigation or prevention of diseases or disorders in human beings or animals which is otherwise liable to tax at 5% under Entry 20A of Part C of the I Schedule of the Act, as ultravires of Article 14 read with Article 19(1)(g), Article 21 and Article 301 of the Constitution of India.

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For Petitioner :- Mr.Chandran Karuppiah
For Respondents:- Mr. Mr.Haja Naziruddin,
Special Government Pleader(Taxes)

JUDGMENT

(Order of the Court was made by CHITRA VENKATARAMAN,J.)

The writ petition is filed against the order of the Tamil Nadu Taxation Special Tribunal dismissing the original petitions filed by the petitioner challenging the condition prescribed under Entry 7 of Part E of the First Schedule of the TNGST Act, 1959 to the effect that all tooth pastes whether or not medicated or as defined under the Drugs and Cosmetics Act, 1940, is liable to the rate of 12%, is illegal and consequently, the exclusion of the products capable of being used as tooth pastes which is otherwise a medical formulation or preparation ready for use externally for treatment of mitigation or prevention of diseases or disorders in human beings or animals which is otherwise liable to tax at 5% under Entry 20A of Part C of the I Schedule of the Act, is ultra vires of Article 14 read with Article 19(1)(g), Article 21 and Article 301-A of the Constitution of India.

2. The Tribunal dismissed the original petition under order dated 12.9.2001 rejecting the plea of the petitioner that the tooth paste sold by the assessee be treated as drugs and medicines falling under Entry 20-A Part C of the First schedule to the Tamil Nadu General Sales Tax Act, 1959. It held that the interpretation of the entries was to be on the basis of the intention of the Legislature in bringing these products under Entry 7 of Part E of First Schedule. Consequently, the Tribunal held that the petitioner's case could not be accepted to exclude the items manufactured and marketed by the assessee as not falling Entry 7 of Part-E of the I Schedule. Aggrieved by the order of the Tribunal, the present writ petition has been preferred by the assessee.

3. Learned counsel for the petitioner submitted that the tooth paste sold by the petitioner are manufactured under the drug licence issued by the Food and Drug Authorities of Gujarat and that Thermoseal and RAThermoseal are medical preparations and cannot be equated with ordinary tooth pastes to fall under Entry 7 Part-E. Placing reliance on the decision of this Court in V.C.RAMALINGAM AND SONS AND ANOTHER VS. STATE OF TAMIL NADU AND OTHERS (127 STC 382) and the decision of the Supreme Court in PUMA AYURVEDIC HERBAL (P) LTD., VS. COMMISSIONER, CENTRAL EXCISE,NAGPUR (145 STC 200), learned counsel sought for an interpretaton of the item as medicinal preparation liable to be assessed under Entry 20 A Part-C .

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4. Heard the learned counsel on either side and perused the materials on either side.

5. We do not find any justifiable ground to accept the contention of the petitioner to hold the items in question as medicinal preparation by the mere application of the decision relied on by the assessee petitioner herein without any factual basis to hold so. In the decision reported in STATE OF GOA AND OTHERS VS. LEUKOPLAST (INDIA) LTD (105 STC 318), while dealing with a challenge made as to whether adhesive plaster, surgical wound dressing and crepe bandage could be treated as medicines, the Apex Court held that the question whether the products manufactured by the assessee could be treated as "drugs and medicines" had to be found out as to how those products were understood and treated in the market, whether in the ordinary commercial sense, those articles were considered as drugs and medicines. The question whether the products manufactured by the assessee could be treated as "drugs or medicines" could not be answered straight away. Their medical contents, if any, had to be ascertained. Their curative function was to be found out. It had to be decided whether they could be called medicament at all and whether they were used to cure or alleviate or prevent disease or to restore or preserve health. These were basically questions of fact which should have been agitated before the statutory appellate authority. The Apex Court held that there was no reason for the assessee to by-pass the statutory remedy. The issues raised herein stand on no different footing. Considering the fact that the proceedings challenged before this Court are at the stage of assessment, the contention now raised before this Court merits to be taken before the assessing authority concerned for consideration on merits.

6. In the light of the decision in STATE OF GOA AND OTHERS VS. LEUKOPLAST (INDIA) LTD. (105 STC 318), we do not find any justification to accept the plea of the assessee herein. On the other hand, the proper course would be for the assessee to place its plea with all the supporting materials before the Assessing Officer so that necessary findings could be arrived at as to the entry under which the item should be assessed. Accordingly, we direct the petitioner to appear before the Assessing Officer, the second respondent herein, on 20th December 2007 and place his objections with all supportive materials to support the plea based on the decision of this Court in V.C.RAMALINGAM AND SONS AND ANTOEHR VS. STATE OF TAMIL NADU AND OTHERS (127 STC 382) and the decision of the Supreme Court in PUMA AYURVEDIC HERBAL (P) LTD., VS.COMMISSIONER, CENTRAL EXCISE, NAGPUR (145 STC 200). If any such objection is filed by the petitioner, the Assessing Authority shall consider the same in the light of the above decisions relied on by the petitioner and pass orders accordingly. If there is any delay on the part of the petitioner in filing the objections on the said date, it is open to the Assessing Officer to pass necessary orders on merits and complete the proceedings.

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With these observations, all these writ petitions are disposed of. No costs.

Sd/
Asst.Registrar

/true copy/

Sub Asst.Registrar

krr/

To:

1. The Registrar,
Tamil Nadu Taxation Special Tribunal
Chennai.

2. The Commercial Tax Officer,
Vallalarnagar, Assessment Circle,
Chennai .

3. The State of Tamil Nadu rep. By
its Secretary, Department of Commercial
Taxes and Religious Endowements
Fort St. George, Chennai.

1 cc To Mr.K.J.Chandran, Advocate, SR.71064.
1 cc To The Special Government Pleader (Taxes), SR.70648.

W.P.No.44482 of 2002

VRK(CO)
RVL 26.12.2007

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